Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

STEVEN ROSENBERG, M.D.,

Petitioner,

v.

HUALAPAI INDIAN NATION,

Respondent.

On Petition for Writ of Certiorari To The Supreme Court of the State of Arizona

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the sovereign immunity of an Indian tribe extend to off-Indian County (extra-territorial), tortuous conduct?

   a. Does Congress, and Congress alone, have the authority to establish the boundaries of tribal sovereign immunity, a judicially-created doctrine, or may this Court define its outer boundaries, as this Court has suggested in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700 (1998)?

   b. Is tribal sovereign immunity broader than the immunity provided to foreign sovereign nations?

2. Does a tribe waive its sovereign immunity by engaging in conduct that would lead a reasonable person to believe that he or she might have recourse in a court of competent jurisdiction for the negligence acts of the tribe?

PARTIES TO PROCEEDING

Petitioner is Steven Rosenberg, M.D., Plaintiff in the Mohave County, Arizona, Superior Court, Appellant in the Arizona Court of Appeals, and Petitioner before the Arizona Supreme Court.

Respondent is the Hualapai Indian Nation, named as Defendant in the complaint filed with the Mohave County, Arizona, Superior Court.

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INTRODUCTION

When this Court last addressed the boundaries of tribal sovereign immunity in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700 (1998), this Court held that a tribe's sovereign immunity extended to its off-reservation, commercial contract disputes. *Id.* at 760, 118 S.Ct. at 1705. This Court reached this result, however, with reluctance: "There are reasons to doubt the wisdom of perpetuating the doctrine. . . . [¶] These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule." *Id.* at 758, 118 S.Ct. at 1704-05; *see also Seielstad*, "The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty," 37 TULSA L.REV. 661, 771 (2002) ("All nine justices express in *Kiowa Tribe* displeasure with the doctrine of tribal immunity"). Both the Majority, and Justice Stevens in dissent, expressed concern about the impact of tribal sovereign immunity on persons injured by a tribe's tortuous conduct: "In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.*; *see also id.* at 766, 118 S.Ct. at 1708 (Stevens, J., dissenting) ("[T]he rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's

reasoning limits the rule to lawsuits arising out of voluntary contractual relationship").

These sentiments have led both courts and commentators to question the scope of the *Kiowa* holding. Judge Henderson of the Northern District of California queried: "Should [Justice Stevens'] statement be taken as a definitive interpretation of the majority decision, or should it be seen as a warning call?" *Hollynn D'Lil v. Cher-Ae Heights Indian Community of the Trinidad Racheria*, 2002 WL 33942761, *6 (N.D.Cal. 2002). Some courts have viewed Justice Stevens' statement as a warning, and have upheld limitations on tribal sovereign immunity. *See, e.g.*, *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 148 P.3d 1126, 1133-39 (Cal. 2006) (holding that tribal sovereign immunity did not preclude action by California state agency against tribe under the Political Reform Act, Cal.Gov.Code, § 81000 *et seq.*); *D'Lil, supra*, 2002 WL 33942761, *8-9 (declining to find tribe immune from the Americans with Disabilities Act for customers at a tribal-owned hotel). Other courts have held that *Kiowa Tribe* stood for the proposition that tribal immunity is essentially limitless. *See, e.g., Foxworthy v. Puyallup Tribe of Indians Ass'n*, 169 P.3d 53, 55 (Wash.App. 2007) ("A tribe's sovereign immunity extends to tribal commercial and governmental activities both on and off the tribe's reservation, and it provides a defense to suits filed against them in state and federal courts") (citing *Kiowa Tribe*), *review granted*, 195 P.3d 89 (Wash. 2008); *Beecher v.*

Mohegan Tribe of Indians of Connecticut, 918 A.2d 880, 884 (Conn. 2007) ("Tribal sovereign immunity is dependent upon neither the location nor the nature of the tribal activities") (also citing *Kiowa*).

The present matter implicates the very concerns expressed by the *Kiowa* Majority and amplified by Justice Stevens in dissent. Plaintiff-Petitioner Dr. Steven Rosenberg was seriously injured while participating in an extra-territorial commercial endeavor of the Hualapai Indian Nation (the "Tribe"), his injuries caused by the gross negligence of the Tribe and its employees. Notwithstanding the fact that Dr. Rosenberg was injured due to the Tribe's tortuous conduct, occurring outside Haulapai Indian geographic territory, by one of the Tribe's commercial operations, the Tribe has successfully asserted to date that Dr. Rosenberg is barred from seeking recovery for his physical injuries from the Tribe due to its sovereign immunity. Dr. Rosenberg urges this Court to grant certiorari in this matter, and resolve the question left unanswered by the *Kiowa* Court – a question that has perplexed courts for decades – namely, whether tribal sovereign immunity is effectively limitless, extending to the extra-territorial, tortuous conduct of a tribe.

DECISIONS BELOW

On motion of the Tribe, the Superior Court of the State of Arizona, Mohave County, dismissed Dr. Rosenberg's personal injury complaint on grounds of

tribal sovereign immunity on January 14, 2008. *Appendix 18.*

Dr. Rosenberg appealed to the Arizona Court of Appeals, Division One. The Arizona Court of Appeals affirmed the trial court's dismissal in an unpublished decision dated March 24, 2009. *Appendix 5-17.*

The Arizona Supreme Court denied Dr. Rosenberg's timely petition review of the matter on September 23, 2009. *Appendix 1.*

JURISDICTION

The Arizona Court of Appeals denied Plaintiff-Appellant's Petition For Review on September 23, 2009. *Appendix 1.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter does not involve the construction or interpretation of any Constitutional or statutory provisions.

Title 36 of the Code of Federal Regulations, Section 7.4(b), governing the Colorado whitewater boat trips, has some application to the present matter, and is reprinted below:

> (b) Colorado whitewater boat trips. The following regulations shall apply to all

persons using the waters of, or Federally owned land administered by the National Park Service, along the Colorado River within Grand Canyon National Park, upstream from Diamond Creek at approximately river mile 226:

(1) No person shall operate a vessel engaging in predominantly upstream travel or having a total horsepower in excess of 55.

(2) U.S. Coast Guard approved life preservers must be worn by every person while on the river or while lining or portaging near rough water. One extra preserver must be carried for each ten (10) persons.

(3) No person shall conduct, lead, or guide a river trip unless such person possesses a permit issued by the Superintendent, Grand Canyon National Park. The National Park Service reserves the right to limit the number of such permits issued, or the number of persons traveling on trips authorized by such permits when, in the opinion of the National Park Service, such limitations are necessary in the interest of public safety or protection of the ecological and environmental values of the area.

(i) The Superintendent shall issue a permit upon a determination that the person leading, guiding, or conducting a river trip is experienced in running rivers in white water navigation of similar difficulty, and possesses appropriate equipment, which is identified in the terms and conditions of the permit.

(ii) No person shall conduct, lead, guide, or outfit a commercial river trip without first securing the above permit and possessing an additional permit authorizing the conduct of a commercial or business activity in the park.

(iii) An operation is commercial if any fee, charge or other compensation is collected for conducting, leading, guiding, or outfitting a river trip. A river trip is not commercial if there is a bona fide sharing of actual expenses.

(4) All human waste will be taken out of the Canyon and deposited in established receptacles, or will be disposed of by such means as is determined by the Superintendent.

(5) No person shall take a dog, cat, or other pet on a river trip.

(6) The kindling of a fire is permitted only on beaches. The fire must be completely extinguished only with water before abandoning the area.

(7) Picnicking is permitted on beach areas along the Colorado River.

(8) Swimming and bathing are permitted except in locations immediately above rapids, eddies and riffles or near rough water.

(9) Possession of a permit to conduct, guide, outfit, or lead a river trip also authorizes camping along the Colorado River by persons in the river trip party, except on lands within the Hualapai Indian Reservation which are administered by the Hualapai Tribal Council; Provided, however, That no person shall camp at Red Wall Cavern, Elves Chasm, the mouth of Havasu Creek, or along the Colorado River bank between the mouth of the Paria River and the Navajo Bridge.

(10) All persons issued a river trip permit shall comply with all the terms and conditions of the permit.

STATEMENT OF THE CASE

I. Factual Background

A. The Hualapai Indian Nation and Grand Canyon National Park

The Hualapai Indian Reservation was established in 1883 by executive order of President Chester A. Arthur. *See Navajo Nation v. United States Forest Service*, 408 F.Supp.2d 886, 891 (D.Ariz. 2006), *aff'd in part, rev'd in part*, 479 F.3d 1024, *reh'g granted en banc*, 506 F.3d 717 (2007). The order expressly provided that the northern boundary of the reservation was the "southern shore" of the Colorado River, and verbal descriptions of the reservation at the time indicated that it was "devoid of water." The Tribe, however, believing that the Colorado River forms the backbone of their lifeline, have maintained that their tribal boundaries extend to the middle of the Colorado River. *See generally Lesoeur v. United States*, 21 F.3d 965, 967 n.2 (9th Cir. 1994) (describing boundary dispute). This boundary dispute remains unresolved to the present day, with the parties essentially "agreeing to disagree."

The Grand Canyon was designated as a National Monument in 1908, and upgraded to National Park status in 1919. It southern boundary includes, for a considerable stretch, the northern boundary of the Hualapai Indian Reservation. The Colorado River runs along the bottom of the Canyon.

Whitewater rafting along the Colorado River is a major activity within the Park. For the most part, whitewater raft operators are regulated by the United States Government. *See* **36 C.F.R. § 7.4(b)**. Section 7.4(b) provides that all whitewater raft operators must possess a permit issued by the Park Superintendent. The Superintendent can only issue a permit upon a determination that "the person leading, guiding, or conducting a river trip is experienced in running rivers in white water navigation of similar difficulty, and possesses appropriate equipment. . . ." **36 C.F.R. § 7.4(b)(3)(I)**.

There is, however, one important caveat to the National Park Service's regulation of whitewater rafters within the Park. Specifically, the regulations apply only to whitewater rafters that occur "upstream from Diamond Creek at approximately river mile 226." **36 C.F.R. § 7.4(b)(1)**. As the United States Court of Appeals for the Ninth Circuit has explained, this limitation on the Service's regulation of whitewater rafters was added in 1977 specifically to accommodate the Hualapai tribe: "The Tribe's tours enter the river at Diamond Creek and operate solely downstream from this point." *Lesoeur*, 21 F.3d at 967 n.1. In other words, the rafting operations of the Hualapai Indian Nation are exempt from the regulations and oversight of the National Park Service.

B. Dr. Rosenberg's Whitewater Rafting Trip

Acting through his travel agent in or near Chicago, Dr. Rosenberg and his son purchased a river tour from the Hualapai River Runners, the business name of the Hualapai tribe's Grand Canyon river tours. *Appendix 36.* On June 21, 2005, Dr. Rosenberg and his son traveled to the Hualapai Indian Reservation. *Id.* The next morning, they participated in the rafting tour conducted by the Hualapai River Runners. *Id.*

Before they were permitted to leave for the tour, the River Runners required Dr. Rosenberg and his son to sign a form entitled "Assumption of Risk and Responsibility and Release of Liability." *Appendix 36.* In this form, the tribe required the tour participants to acknowledge that "there are inherent dangers in this activity," and that they released the tribe of any liability as a result of these inherent risks. The Release specifically states that "I have read the foregoing acknowledgement of risk, assumption of risk and responsibility, and release of liability. I understand that by signing this document I may be waiving valuable legal rights." *Appendix 36-37; see also Appendix 53-56* (copy of Release, as attached to Plaintiff's First Amended Complaint).

Nowhere in this form does the tribe indicate that either it believes it has "sovereign immunity" and therefore, the tour participants had (according

to the Tribe) no "legal rights." They had no rights purportedly to waive. *Appendix 37.*

Dugan Steele was the tour guide and pilot of the boat in which Dr. Rosenberg and his son were passengers. *Id.* The raft was equipped with an outboard motor, which in turn was (or should have been) equipped with a "kill" switch that would stop the motor instantly in the event that the guide was thrown from the boat. *Appendix 38.*

At the 232 Mile Rapids, Dugan Steele steered the boat directly towards a rock on the north side of the River. *Appendix 37.* The Rosenbergs, two guides, and two other passengers were thrown out of the raft. *Id.* Steele was not using the "kill switch" for the boat's engine. The boat's motor continued running and the propeller struck both Dr. Rosenberg's head and left hand at full speed. *Appendix 38.* His sustained serious injuries. *Id.*

The 232 Mile Rapids and the location of the accident at issue was not within the geographic confines of the Hualapai Indian Reservation or Nation. *Id.*

The River Runners were ill-prepared to deal with Dr. Rosenberg's injury. *Id.* at ¶ 24. The other passengers, and not the guides, provided assistance to Dr. Rosenberg. *Id.* One passenger described Dr. Rosenberg's treatment as follows:

> The guides, and I'm only telling you this because I was just appalled by it, he went, I said do you have a first aid kit, he needs to wrap, his hand needs to be wrapped. They found the first aid kit, or were looking for it or something, and he said yea, we have an Advil, give him an Advil. And I remember to myself, just sitting there, and I was still in shock, I was going, okay, you're kidding me, I mean, we didn't know if his airways were open at the time, I mean that was their idea of first aid.

Appendix 38-39.

II. Procedural Background

Dr. Rosenberg sustained serious injuries to his head and hand as a result of this incident. He respectfully requests that this Court reverse the dismissal of his complaint and remand for a trial on the merits. He filed his original complaint against the Tribe on February 16, 2007. *Appendix 24-31.* The Hualapai Indian Nation appeared in the matter and moved to dismiss Plaintiff's complaint. Following oral argument on October 10, 2007, Dr. Rosenberg filed an amended complaint. *Appendix 32-57.* Four days thereafter, the trial court granted Defendant's motion to dismiss, holding that the Tribe was protected by sovereign immunity. *Appendix 22.* Specifically, the trial court held: "IT IS ORDERED granting the motion to dismiss on the grounds that the Hualapai Indian Nation is

absolutely immune from suit in state court." *Id.* The trial issued a signed order of dismissal on January 16, 2008. *Appendix 18.*

Dr. Rosenberg appealed to the Arizona Court of Appeals, Division One. The Court of Appeals affirmed in an unpublished decision dated March 24, 2009. *Appendix 5-17.* The Arizona Court of Appeals held that Indian tribes have immunity greater than that enjoyed by foreign nations, *Appendix 10,* and that Congress, and not the judiciary, had the sole authority to determine the parameters of tribal sovereign immunity, *Appendix 12-13* ("Congress, not the judiciary, sets the parameters of tribal immunity. The courts merely interpret Congress's intent. . . .").

Following the denial of his motion for reconsideration, *Appendix 3,* Dr. Rosenberg filed a timely petition for review to the Arizona Supreme Court. The Arizona Supreme Court denied review without comment on September 23, 2009. *Appendix 1.* He now seeks relief in this Court.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari To Clarify The Limited Scope Of Its Holding In *Kiowa Tribe.*

A. The Doctrine Of Tribal Sovereign Immunity Was Intended To Recognize The Sovereign Status Of Indian Tribes And, As Such, Is Effectively Co-Extensive With The Concept Of Foreign Sovereign Immunity.

The evolution of tribal sovereign immunity is a curious one. The concept of sovereign immunity stems from the "ancient maxim that 'the King can do no wrong.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 103 n.2, 116 S.Ct. 1114, 1146 n.2 (1996) (Stevens, J., dissenting) (citing 1 W. Blackstone, Commentaries). The doctrine was first acknowledged by this Court in 1821 in *Cohens v. State of Virginia*, 19 U.S. 264 (1821), where the Supreme Court observed that "[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits." *Id.* at 411-12.

Ironically, the concept that foreign nations were immune from suit in United States courts was recognized even earlier by the Supreme Court. In *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812), the courts were asked to decided the ownership of a French military vessel. Declaring that the government of France was immune to the suit, Chief Justice Marshall, writing for the Court, stated:

> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to wave the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Id. at 137. In prevailing, the United States Attorney argued that "[i]f the courts of the United States should exercise such a jurisdiction it will amount to a judicial declaration of war." *Id.* at 126.

The United States Supreme Court recognized that Indian tribes were independent sovereigns twenty years thereafter, in the matter of *Worcester v. State of Georgia*, 31 U.S. 515 (1832). In *Worcester*, the Court stated:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, . . . The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and

> sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning.

Id. at 559-60 (emphasis added).[1]

In 1919, the Supreme Court formally acknowledged the obvious corollary to its conclusion that Indian nations were sovereign entities, namely, that they were also entitled to sovereign immunity. In *Turner v. United States*, 248 U.S. 354 39 S.Ct. 109 (1919), the Court held that "Like other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace." *Id.* at 357-58, 39 S.Ct. at 110.

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[1] Justice Marshall referred to tribes as "domestic dependent nations." *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831). He stated:

> It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations.

Id. at 2.

Since *Turner*, the Supreme Court has addressed the scope and effect of this sovereign immunity on numerous occasions. Several key principles have emerged from these cases, the most importance of which, for purposes of the present petition, is that tribal sovereign immunity is essentially co-extensive with that of foreign sovereign immunity. This Court has restated this principle on numerous occasions. *See C & L Enterprises*, 532 U.S. 411, 421 n. 3, 121 S.Ct. 1589, 1595 n.3 (2001) ("Instructive here is the law governing waivers of immunity by foreign sovereigns"); *Kiowa*, 523 U.S. at 759, 118 S.Ct. at 1705 ("In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268-269, 117 S.Ct. 2028, 2034 (1997) ("Indian tribes, we therefore concluded, should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity") (citation omitted); *Oklahoma Tax Com'n v. Graham*, 489 U.S. 838, 841-842, 109 S.Ct. 1519, 1521 (1989) (citing cases construing foreign sovereign immunity in resolving issue involving tribal immunity). In *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 111 S.Ct. 2578 (1991), the Court considered whether an Indian nation could sue a state, much as one state may sue another. In rejecting the contention, the Supreme Court expressly noted the similarities between foreign nations and Indian tribes:

> Respondents argue that Indian tribes are more like States than foreign sovereigns. That is true in some respects: They are, for example, domestic. The relevant difference between States and foreign sovereigns, however, is not domesticity, but the role of each in the convention within which the surrender of immunity was for the former, but not for the latter, implicit. What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.

Id. at 782, 111 S.Ct. at 2582-83.[2]

Put simply, Indian tribes are sovereign entities, and as the doctrine of tribal sovereign

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[2] Following unsuccessful efforts by the federal government to assimilate tribes, tribal sovereign immunity has been invoked to further the "overriding goal" of "encouraging tribal self-sufficiency and economic development." *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510, 111 S.Ct. 905, 910 (1991) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, 107 S.Ct. 1083, 1092 (1987)).

immunity recognizes, are to be accorded the trappings of this status, much like foreign states.

B. Foreign Nations Are Not Immune For Their Tortious Conduct, Occurring Extra-territorially, By Their Commercial Endeavors.

Although foreign nations have long enjoyed sovereign immunity in the courts of the United States, it has also long been held that such immunity is limited when the activities occurring within the territory of the United States are commercial. For example, in *Hannes v. Kingdom of Roumania Monopolies Institute*, 20 N.Y.S.2d 825 (N.Y.App. 1940), a New York appellate court explained:

> The development of the practice of states undertaking commercial activities has led to a distinction in considering the question of immunity between acts of a private nature said to be *jure gestionis* as contrasted with acts of a public nature which are *jure imperii*. Controversies in the first class are sometimes held to be subject to the jurisdiction of foreign courts, while those in the latter are not.

Id. at 833. This general rule was summarized by the Second Circuit several decades later, noting that the "commercial activities" exemption within the Foreign

Sovereign Immunities Act derived from "the very large body of case law which existed in American law upon passage of the Act in 1976" and "current standards of international law." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 309-10 (2d Cir. 1981) (quotations omitted), *cert. denied*, 454 U.S. 1148, 102 S.Ct. 1012 (1982), *overruled on other grounds*, *Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azberbaijan Republic*, 582 F.3d 393 (2d Cir. 2009).

When a foreign nation conducts a commercial activity within the geographic boundaries of the United States, the foreign nation is liable for harm caused by the torts caused by this commercial activity. *Restatement (Third) of Foreign Relations Law* §§ 453(1), (2)(a) and (b); *see also Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1477 (9th Cir. 1995) (holding that the commercial activities exception to sovereign immunity included both personal injury torts and economic torts).

There are important reasons for these limitations on sovereign immunity. Obviously, a sovereign engaging in a commercial activity is not doing so as a "act of state," but in order to expand its coffers. Thus, it is only reasonable for the sovereign to include in its financial calculus the potential harm that its activities might cause to others. As the Arizona Supreme Court stated in *Bryant v. Silverman*, 703 P.2d 1190 (Ariz. 1985), "[t]he basic policies underlying tort law are to provide compensation for the injured victims, and to deter

intentional and deliberate tortious conduct. . ." *Id.* at 1195.

C. *Kiowa* Is Fully Consistent With These Principles Of Tribal Sovereignty, And This Court Should Grant Certiorari To Clarify The Limited Holding Of *Kiowa*.

In *Kiowa*, a tribe agreed to purchase certain stock issues by Clinton-Sherman Aviation, Inc., and signed a promissory note with the plaintiff to finance the stock purchase. The tribe delivered the note to a company in Oklahoma City – off tribal land – and promised to make the payments in Oklahoma City, again, beyond tribal land.

This Court ultimately concluded that tribal sovereign immunity attached to this commercial transaction. In so doing, this Court reiterated the relationship between tribal sovereign immunity and that of foreign nations. *Kiowa*, 523 U.S. at 759, 118 S.Ct. at 1705 ("In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries"). This Court did observe that tribal sovereign immunity does possess one attribute not necessarily present in matters involving foreign nations, namely, the domestic public policy of "promot[ing tribal] economic development and tribal self-sufficiency." *Kiowa*, 523 U.S. at 757, 118 S.Ct. at 1704. In light of these concerns, the Court invited Congress to revisit the potential scope of tribal

immunity. *Id.* at 758-59, 118 S.Ct. at 1705. Ultimately, the Court held that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id.* at 760, 118 S.Ct. at 1705 (emphasis added).

The Court was notably silent on whether immunity extended to a tribe's commercial, extra-territorial tortuous conduct. Moreover, the language of *Kiowa* suggests that its holding reflected the outer limits of such tribal immunity. Although ultimately ruling for the tribe, the Court did so with little enthusiasm. The majority opinion took it upon itself to critique, rather than defend, its own holding:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who

> have no choice in the matter, as in the case of tort victims.
>
> These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.

Id. at 758, 118 S.Ct. at 1704-05 (citations omitted; emphasis added).

All nine Justices expressed some degree of displeasure with or concern about tribal sovereign immunity in *Kiowa*. *See id.*; *see also Seielstad*, *supra*, 37 TULSA L.REV. at 711 ("All nine justices express in *Kiowa Tribe* displeasure with the doctrine of tribal immunity"); Wilson, *Nations Within A Nation: The Evolution of Tribal Immunity*, 24 AM.IND.L.REV. 99, 126 (2000) ("While the ultimate holding of *Kiowa* upheld the tribe's immunity from suit, the Court was clear in its disdain for the doctrine"). Nonetheless, lower courts have consistently construed *Kiowa* as a watershed decision, substantially increasing the scope and breadth of tribal sovereign immunity. Specifically, courts have construed *Kiowa* as defining tribal sovereign immunity as essentially limitless, *see Beecher v. Mohegan Tribe of Indians of Connecticut*,

918 A.2d 880, 884 (Conn. 2007) ("Tribal sovereign immunity is dependent upon neither the location nor the nature of the tribal activities," citing *Kiowa*); *Rosenberg v. Hualapai Indian Nation*, No. 1-CA-CV 08-0135 (March 24, 2009), *Appendix 9-10* ("Even the dissenting Justices in *Kiowa* recognized that nothing in the Court's reasoning limited its application to lawsuits arising out of voluntary contractual relationships").[3] In light of this Court's clear displeasure with the doctrine, and the limited issue before it, an expansive reading of *Kiowa* is incorrect, and Dr. Rosenberg urges this Court to grant certiorari to resolve the questions unanswered by *Kiowa*.

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[3] *See also Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Tex. ex rel. Tribal Council*, 72 F.Supp.2d 717, 719 (E.D.Tex. 1999) ("Nothing in *Kiowa* could be construed to limit sovereign immunity to contractual claims in fact, the Court expanded the scope of sovereign immunity by including contracts made off the reservation for governmental or commercial activities"); *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 637 (1999) (citing Justice Stevens' dissent in *Kiowa* for the proposition that this Court extended sovereign immunity to extra-territorial tort claims). As one judge noted, however, Justice Stevens' dissenting statement was less descriptive than it was predictive: "Should this statement [by Justice Stevens] be taken as a definitive interpretation of the majority decision, or should it be seen as a warning call?" *Hollynn D'Lil v. Cher-Ae Heights Indian Community of the Trinidad Racheria*, 2002 WL 33942761, *6 (N.D.Cal. 2002).

D. This Court Should Also Grant Certiorari To Clarify That Courts, Which Created The Doctrine, Have Authority To Define The Outer Bounds Of The Doctrine In The Absence Of Congressional Action.

In a related vein, many lower courts have concluded that *Kiowa* stands for the complete abdication of judicial review of tribal immunity, concluding that Congress, and only Congress, can either modify or limit the otherwise limitless doctrine of tribal immunity. *See, e.g., Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) ("The Court expressly declined to confine a tribe's sovereign immunity to its governmental and/or on-reservation activities, reasoning that it was for Congress, not the judiciary, to adjust the boundaries of tribal immunity"); *Rosenberg, supra, Appendix 13* ("Congress, not the judiciary, sets the parameters of tribal immunity"); *see also In re Greene*, 980 F.2d 590, 594 (9th Cir. 1992) ("Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial component").

However, this reasoning is inconsistent, even with this Court's own statements in *Kiowa*. This Court expressly recognized that the doctrine itself was a judicial creation, *see Kiowa*, 523 U.S. at 756-57, 118 S.Ct. at 1703-04, and that the Court itself

had "taken the lead in drawing the bounds of tribal immunity," *id.* at 759, 118 S.Ct. at 1705. The *Kiowa* Court's invitation for Congressional action was a temporal matter. The Court decided *Kiowa* in 1998, at a time when Congress was considering several bills significantly altering various aspects of tribal sovereignty, including their immunity. In fact, congressional hearings conducted, and to be conducted, with respect to such legislation were expressly discussed during oral arguments in *Kiowa*. *See Seislstad, supra*, 37 TULSA L.REV. at 711-12. Thus, this Court's deference to Congress in *Kiowa* was a matter of pragmatism, not jurisprudence.

Congress disregarded this Court's invitation in *Kiowa*. This inaction alone, however, does not provide a basis for inferring not only Congressional intent but, indeed, the concept of complete Congressional pre-emption of this common law doctrine.[4] "Inaction, we have repeatedly stated, is a notoriously poor indication of congressional intent." *Schweiker v. Chilicky*, 487 U.S. 412, 440, 108 S.Ct. 2460, 2476 (1988) (citing *Bob Jones University v. United States*, 461 U.S. 574, 600, 103 S.Ct. 2017, 2032 (1983); *Zuber v. Allen*, 396 U.S. 168, 185-186, n. 21, 90 S.Ct. 314, 323-325, n. 21 (1969). This Court should grant certiorari to clarify that, with respect to sovereign immunities created by the courts and not pre-empted by express statute, the courts not only

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[4] Congress' enactment of the Foreign Sovereign Immunities Act demonstrates that Congress knows how to, and is willing to, occupy a field of immunity that had previously been resolved through common law and judicial fiat.

retain jurisdiction to establish the parameters of such immunities but, in fact, should exercise this jurisdiction and authority when proper disputes regarding the outer limits of such immunities are presented to the courts.

E. Summary

This Court should accept review to clarify that *Kiowa* did not hold that tribal sovereign immunity was limitless, providing complete immunity for extra-territorial tortuous conduct, and that Courts retain the jurisdiction and authority to define the outer limits of the doctrine. Indeed, this Court has never endorsed complete extra-territorial immunity. *Cf. Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267 (1973) ("But tribal activities conducted outside the reservation present different considerations. State authority over Indians is yet more extensive over activities not on any reservation"); *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905, 909 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories").[5]

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[5] At least one court has stated that a tribe could be held liable for its extra-territorial, commercial tortuous conduct. In *DeFeo v. Ski Apache Resort*, 904 P.2d 1065 (N.M.App.), *cert. denied*, 903 P.2d 844 (1995), the New Mexico Court of Appeals held that a tribe had sovereign immunity for tortious conduct at a tribally-owned business on-reservation, but not for off-reservation tortious conduct. *Id.* at 1068.

II. This Court Should Grant Certiorari To Clarify Its Holding In *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589 (2001), Is Not Limited To Arbitration Clauses, But That Other Contractual Provisions By A Tribe, Inconsistent With Its Sovereign Immunity, Can Act As A Waiver.

The Tribe requested that Dr. Rosenberg, as a precondition to his participation in the whitewater rafting tour, sign a General Release of Liability, acknowledging that whitewater rafting was inherently dangerous and, therefore, absolving the Tribe of potential tort claims. Notably, the Release did not in any manner specify or indicate that the Tribe was immunity from liability, regardless of the Release. This release, which acknowledges that the signor had legal rights that could be waived, constitutes a waiver of sovereign immunity.

In *Kiowa*, this Court clearly acknowledged that a tribe can waive its tribal immunity. *Kiowa*, 523 U.S., at 754, 760, 118 S.Ct. at 1703, 1705. This Court specifically addressed the issue of contractual waiver in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589 (2001). In *C & L Enterprises*, the tribe provided a pre-printed contract to its vendors, which indicated that any disputes were subject to arbitration. When an aggrieved vendor sought to invoke the arbitration clause, the tribe

sought to dismiss the dispute, claiming it was immune from suit. In a unanimous decision, this Court disagreed, declaring that the arbitration clause acted as an express tribal waiver of sovereign immunity. This Court stated:

> The contract, as we have explained, is not ambiguous. Nor did the Tribe find itself holding the short end of an adhesion contract stick: The Tribe proposed and prepared the contract; C & L foisted no form on a quiescent Tribe. . . . [¶] For the reasons stated, we conclude that under the agreement the Tribe proposed and signed, the Tribe clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court; the Tribe thereby waived its sovereign immunity from C & L's suit.

Id. at 423, 121 S.Ct. at 1596-97.

Other courts have reached similar results. In *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008), the Oklahoma Supreme Court considered a dram shop action brought by an individual severely injured when involved in a head-on collision with an individual who had allegedly left a tribal casino intoxicated. The casino, the Oklahoma high court noted, had consented to being bound by the laws of Oklahoma when it applied for and obtained a license to sell alcoholic beverages at the casino. This agreement, made in the licensing application, was

sufficient to waive the tribe's immunity for civil dram shop acts. "[A]n effective waiver," the court noted, "does not require specific or magic words." *Id.* at 826. "In the licensing application, Thunderbird casino agreed to be bound by the laws of the State of Oklahoma. . . . [¶]There is nothing in Thunderbird casino's agreement to be bound by the laws of this state which limits the state's enforcement mechanisms, and we will not find a limitation that is not there." *Id.* at 827.

In the present matter, Dr. Rosenberg made his arrangements to participate in the River Runners' tour several months in advance. *Appendix 36.* When he and his son arrived at the rendezvous point for the excursion, he was asked to sign, on his behalf and that of his son, an "Assumption of Risk and Responsibility and Release of Liability." *Appendix 36-37; 53-56* (copy of Release). The form stated that "[t]here are significant elements of risk in any adventure or activity associated with whitewater rafting and incidental camping," and required the signatory to acknowledge the various risks. The signatory was to absolve the Tribe of any liability as a result of this inherently dangerous activity, noting that the signatory "may be waiving valuable legal rights." *Id.*

Presumably, this Assumption and Release became a part of Dr. Rosenberg's contract with the tribe, and was enforceable to the extent that such forms are enforceable under general contract law principles. However, by now asserting that it is

immune from suit, the Tribe acknowledges that this part of the contract, which it drafted, was completely meaningless and highly misleading. With or without the release, the participants simply had no "valuable legal rights" to waive if Appellee is correct.

The Tribe's construction of its own contract is nonsensical. "In interpreting a contract, we attempt to reconcile and give meaning to all its terms." *Weatherguard Roofing Co., Inc. v. D.R. Ward Const. Co.*, 152 P.3d 1227, 1233 (Ariz. App. 2007). Moreover, a contract should be construed to give effect to all its provisions and to prevent any of the provisions from being rendered meaningless. *Scholten v. Blackhawk Partners*, 909 P.2d 393, 396 (Ariz. App. 1995); *see also Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1144 n.9 (Ariz. 1993) ("[A] contract should be interpreted, if at all possible, in a way that does not render parts of it superfluous").

Here, there are two possible ways of construing the contract at issue. The first is that the Tribe waived its sovereign immunity, but did so only under the terms of the Assumption and Release that it prepared and had its customers sign. This construction renders all parts of the contract meaningful.[6]

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[6] Although entitled a "release," such documents do not automatically absolve the negligent party of liability. In fact, under Arizona law, a "release" does nothing more than create an issue of fact for the jury. *See Phelps v. Firebird Raceway, Inc.*, 111 P.3d 1003, 1013 (Ariz. 2005) (Under Arizona law, the

In contrast, there is the construction of the contract offer by the Tribe. The Assumption and Release is meaningless. Its customers never had any "valuable legal rights" to waive. The Assumption and Release was, apparently, a charade.

Under well settled legal principles, including that of this Court in *C & L Enterprises*, the proper construction is clear. Accordingly, Dr. Rosenberg urges this Court to grant certiorari and hold that contracts must be viewed as a whole, and that contractual provisions inconsistent with absolute immunity constitute a waiver of such immunity.

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enforceability of a release of liability is always a question for the jury).

CONCLUSION

Is a tribe's sovereign immunity limitless, so that it and its commercial offshoots may freely commit tortuous acts beyond the geographic boundaries of Indian country without any obligation to provide redress to its victims? That is the ultimate question Dr. Rosenberg urges this Court to address in the present petition. As the Oklahoma Supreme Court stated in *Bittle v. Bahe*: "Congress did not intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self-imposed regulations." *Id.* at 819. In commenting on this Court's *Kiowa* opinion, one scholar noted:

> Given the expanding scope of tribal activities, tribal immunity can present a danger to those who are harmed by a tribe's activities yet have no forum in which to argue their claims. In other words, tribal immunity has developed into a doctrine that is more than large enough to protect the legitimate interests of tribes, but so large that it unnecessarily harms those who interact with tribes and are injured by them.

Wilson, *Nations Within Nations: The Evolution Of Tribal Immunity*, 24 AM.IND.L.REV. 99, 126 (2000).

Recognition of tribal sovereignty and encouragement of tribal economic independence are laudable objectives and goals. However, such goals

and objectives can be achieved without leaving those are injured or killed by the tortuous, extra-territorial conduct of tribes remediless. Accordingly, Petitioner Stephen Rosenberg respectfully requests that this Court grant certiorari in this matter and define the outer limits of such sovereignty, holding that it does not extend to a tribe's extra-territorial tortuous conduct.

RESPECTFULLY SUBMITTED this 21st day of December, 2009.

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APPENDIX

SUPREME COURT
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Rachelle M. Resnick
Clerk Of The Court

Suzanne D. Bunnin
Chief Deputy Clerk

September 23, 2009

RE:
STEVEN ROSENBERG MD v HUALAPAI INDIAN NATION
Arizona Supreme Court No. CV-09-0152-PR
Court of Appeals Division One No. 1 CA-CV 08-0135
Mohave County Superior Court No. CV 2007-0284

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 22, 2009, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 23rd day of September, 2009.

Rachelle M. Resnick, Clerk

TO:
Joel B Robbins
Theodore Julian Jr
Melissa Iyer
Philip Gurry
mjl

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STEVEN ROSENBERG, M.D., an individual,	1 CA-CV 08-0135
Plaintiff/Appellant,	DEPARTMENT A
v.	Mohave County Superior Court No. CV 2007-0284
HUALAPAI INDIAN NATION, a sovereign entity,	**ORDER**
Defendants/Appellees.	

The court, Presiding Judge Michael J. Brown, Judges Daniel A. Barker and Margaret H. Downie, has received and considered the Motion for Reconsideration filed by Plaintiff/Appellant. After consideration,

IT IS ORDERED denying the Motion for Reconsideration.

DATED this 8th day of May, 2009.

/s/
MARGARET H. DOWNIE, JUDGE

1 CA-CV 08-0135
Mohave County Superior Court CV 2007-0284
A true copy of the foregoing was mailed May 8, 2009 to:

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Philip G. Urry, Clerk
By Deputy Clerk

COURT FILE STAMP:
FILED 3-24-09

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz.R.Crim.P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STEVEN ROSENBERG, M.D., an individual,	1 CA-CV 08-0135
Plaintiff/Appellant,	DEPARTMENT A
v.	**MEMORANDUM DECISION** (Not for Publication- Rule 28, Arizona Rules of Civil Appellate Procedure)
HUALAPAI INDIAN NATION, a sovereign entity,	
Defendants/Appellees.	

Appeal from the Superior Court in Mohave County

Cause No. CV 2007-0284

The Honorable James E. Chavez, Judge

AFFIRMED

Robbins & Curtin PLLC — Phoenix
By Joel B. Robbins
Anne E. Findling
Attorneys for Plaintiff/Appellant

Burch & Cracchiolo PA — Phoenix
By Theodore Julian, Jr.
Melissa Iyer
Attorneys for Defendant/Appellee

DOWNIE, Judge

¶1 Steven Rosenberg ("Rosenberg") appeals from the dismissal of his personal injury lawsuit against the Hualapai Indian Nation (the "Tribe"). Rosenberg contends that the superior court erroneously dismissed his case based on the doctrine of sovereign immunity. For the following reasons, we affirm.

I. BACKGROUND

¶2 Rosenberg was injured in 2005 during a rafting excursion on the Colorado River. The river trip was conducted by Hualapai River Runners, which is operated by the Tribe. For purposes of this appeal, we assume that Rosenberg was injured

outside the geographic boundaries of the Tribe's reservation.

¶3 Before embarking on the river trip, Rosenberg signed a form entitled, "Assumption of Risk and Responsibility and Release of Liability" (the "release"). Among other things, the release stated:

> In consideration of services or property provided, I, and any minor children for which I am parent, legal guardian or otherwise responsible, any heirs, personal representatives or assigns, do hereby release:
>
> THE HUALAPAI TRIBE AND ITS BUSINESS HWAL'BAY BA:J ENTERPRISES, INC. DOING BUSINESS AS GRAND CANYON RESORT CORPORATION.
>
> Its council members, principals, directors, officers, agents, employees and volunteers, from all liability and waive any claim for damage arising from any cause whatsoever.
>
> I have read the foregoing acknowledgment of risk, assumption of risk and responsibility, and release of liability. I understand that by signing this document I may be waiving valuable legal rights.

¶4 Rosenberg filed the instant tort action on February 16, 2007.[1] The summons and complaint were reportedly served on the Tribe in June 2007 by mailing the documents to a post office box in Peach Springs, Arizona, which is located on the reservation.[2] The Tribe did not file an answer, and Rosenberg applied for entry of default. On August 7, 2007, the Tribe filed a motion to dismiss based, *inter alia*, on sovereign immunity. After oral argument on the motion, but before the court ruled, Rosenberg filed an amended complaint that added factual allegations and attached exhibits. Four days later, the superior court granted the motion to dismiss, finding that the Tribe was "absolutely immune from suit in state court." The Tribe moved to strike or dismiss Rosenberg's amended complaint. The court ruled that the amended complaint and the motion to strike were both moot. It affirmed the earlier order of dismissal and also dismissed the first amended complaint with prejudice.

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[1] Rosenberg initially filed a complaint in tribal court in 2006. That suit was voluntarily dismissed. Later in 2006, Rosenberg sued the Tribe in the Mohave County Superior Court, but that suit was never served, and the action abated. Only the Tribe has appeared as a defendant in this action.

[2] The Tribe reasserts that service of process was insufficient. Based on our resolution of the appeal on other grounds, we do not reach this alternative basis for upholding the dismissal.

¶5 Rosenberg timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101 (B).

II. STANDARD OF REVIEW

¶6 We assume as true the facts alleged in the complaint and will not affirm the dismissal unless satisfied, as a matter of law, that Rosenberg would not be entitled to relief under any interpretation of the facts susceptible of proof. *Fid. Sec.Life Ins. Co. v. State, Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580,582 (1998). We review questions regarding sovereign immunity and state court jurisdiction *de novo*. *See Filer v. Tohono O'Odham Nation Gaming Enter.*, 212 Ariz. 167, 169, ¶ 5, 129 P.3d 78, 80 (App. 2006).

III. ANALYSIS

A. Tribal Immunity

¶7 The Tribe is a federally recognized sovereign nation. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suitor the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Tech's, Inc.*, 523 U.S. 751, 754 (1998). The courts "have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred." *Id.* Thus, the "fact" that Rosenberg was injured off-reservation is immaterial. We disagree with Rosenberg's

contention that the *Kiowa* holding applies only to contract cases. Even the dissenting Justices in *Kiowa* recognized that nothing in the Court's reasoning limited its application to lawsuits arising out of voluntary contractual relationships.[3] *Id.* at 766.

¶8 We similarly reject Rosenberg's argument that Indian nations have sovereign immunity equal to, but not greater than, that possessed by other sovereign nations that may be hailed into state courts. While *Kiowa* found it instructive to consider the law governing waivers of immunity by foreign sovereigns, it did not find tribal immunity to be coextensive with foreign sovereign immunity.[4] *Id.* at

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[3] Discussing *Kiowa*, the United States District Court for the Eastern District of Texas more recently found that:

> Nothing in *Kiowa* could be construed to limit sovereign immunity to contractual claims in fact, the Court expanded the scope of sovereign immunity by including contracts made off the reservation for governmental or commercial activities. The court made no distinction between tort and contract claims in applying sovereign immunity.

Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Tex. ex rel. Tribal Council, 72 F. Supp. 2d 717, 719 (E.D. Tex. 1999) (citation omitted).

[4] *Kiowa* also makes clear that "the immunity possessed by Indian tribes is not coextensive with that of the states." 523 U.S. at 756.

759. Nor are the cases cited by Rosenberg persuasive on this point.

¶9 *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), for example, found a waiver of tribal immunity because the tribe contractually agreed to arbitration and entry of a judgment in any court having jurisdiction. *C & L* quotes the same language from Kiowa regarding consideration of the law governing foreign waivers of immunity. *Id.* at 421 n.3. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U. S. 261, 268-69 (1997), held that tribes should be accorded the same status as foreign sovereigns in terms of the ability to sue a state where the state enjoys Eleventh Amendment immunity. The case does not address tribal immunity from suit. In *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989), a case addressing jurisdiction of the federal courts in cases brought by a state against a tribe, the Court specifically noted that, "the merits of the claims of tribal immunity were not properly before the federal courts, and we express no opinion on that question." Id. at 842. Finally, *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775 (1991), was not about tribal sovereign immunity, but addressed a state's Eleventh Amendment immunity from suit by tribes. The comparison of tribes to foreign sovereigns was for the purpose of determining the state's immunity, not the tribe's. Id. at 782.

¶10 The Ninth Circuit has recognized the breadth of tribal immunity, stating:

> The actions of the states and the United States in limiting their own immunity, and the action of Congress in limiting the immunity of foreign states underscore the original scope of sovereign immunity. Against this background of nearly two hundred years of recognizing sovereign immunity's extra-territorial reach, and the repeatedly recognized necessity of specific congressional action to limit tribal sovereign immunity, congressional silence on the issue of Indian tribal immunity is a compelling, if not controlling, factor. Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial component.

In re Greene, 980 F.2d 590, 594 (9th Cir. 1992); *see also Allen v. Gold Country Casino*, 464 F. 3d 1044, 1047-48 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1307 (2007) ("the fact that Congress limited the immunity of foreign sovereigns simply underscores the breadth of [tribal] sovereign immunity in the absence of congressional action; because Congress has not limited the immunity of Indian tribes, it retains its full force.").

¶11 Rosenberg also argues that courts have the authority to determine the outer boundaries of tribal immunity based on the statement in *Kiowa* that, "the Court has taken the lead in drawing the bounds of tribal immunity." *523 U.S.* at 759. However, Congress, not the judiciary, sets the parameters of tribal immunity. The courts merely interpret Congress's intent, and we see neither reason nor authority to expand or contract the boundaries of tribal immunity from those already established by the United States Supreme Court and the Arizona Supreme Court.

B. Jurisdiction of the Arizona Courts

¶12 In 1968, the Arizona Supreme Court considered whether an Indian tribe could be subjected to the jurisdiction of our state courts without tribal consent or the consent of Congress. *See Morgan v. Colo. River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968). *Morgan* involved a tort allegedly committed by a tribe while engaged in a business enterprise in Arizona outside The boundaries of the reservation. The court first observed that, "Congress alone must determine the extent to which immunities afforded tribal status are to be withdrawn." *Id.* at 428, 443 P.2d at 424. The court deemed it immaterial that the tribe had engaged in a proprietary function and held that, "the Colorado River Indian Tribe, being a dependent sovereign immune from suit, cannot be subjected to the jurisdiction of our courts without its consent or

the consent of Congress." *Id.* The court remarked on the unique legal status enjoyed by tribes, noting that, "[i]f the alleged tort-feasor under an identical state of facts had been a state or municipal government, the Federal Government, or a foreign nation, it would have been amenable to suit in either state or federal courts." *Id.* at 428 n.l, 443 P.2d at 424 n.l (citations omitted).

¶13 As Rosenberg's counsel conceded at oral argument, we are bound by *Morgan*. That decision unequivocally establishes the absence of state court jurisdiction over the Tribe in this matter. *See also Smith Plumbing Co., Inc. v. Aetna Cas. & Sur. Co.*, 149 Ariz. 524, 531, 720 P.2d 499, 506 (1986) (affirming dismissal of suit against White Mountain Apache Tribe through its tribal enterprise, stating, "[t]he courts of this state may Not, nor do they desire to, exercise authority over an Indian tribe. Both the Enabling Act (36 U.S. Stat 567) and the Arizona Constitution (Ariz. Const. art 20 § 4) clearly forbid such assertion of jurisdiction.").

C. Waiver

¶14 Rosenberg also argues that, even if the Tribe initially enjoyed immunity, it waived that protection when it required him to sign the release discussed *supra*. We disagree.

¶15 The release says nothing about waiving immunity. And as Rosenberg recognized at oral

argument, any waiver of tribal immunity must be express, not implied. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *see also Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Cmty.*, 138 Ariz. 378, 383, 674 P.2d 1376, 1381 (App. 1983) ("[A]ny waiver of [tribal] immunity is to be interpreted liberally in favor of the Tribe and restrictively against the claimant."). Nothing in the record suggests that the Tribe or Congress expressly waived immunity in this matter.[5]

---

[5] At oral argument, Rosenberg advanced arguments regarding the tribal charter and a "sue or be sued" clause purportedly included in that charter. Not only were these arguments not raised in the court below, they were not briefed. An appellate court will not consider issues and theories not presented below. *Richter v. Dairy Queen of S. Ariz., Inc.*, 131 Ariz. 595, 596, 643 P.2d 508, 509 (App. 1982); *Alano Club 12, Inc. v. Hibbs*, 150 Ariz. 428, 431, 724 P.2d 47, 50 (App. 1986). Similarly, arguments raised for the first time at oral argument are untimely and will not be considered. *State v. Powers*, 200 Ariz. 123, 129, en 21, 23 P.3d 668, 674 (App. 2001). Rosenberg's parenthetical description of the *Ute Distribution Corp. v. Ute Indian Tribe* case, contained on page 5 of his response to the motion to dismiss, did not preserve this argument for purposes of appeal. *See, e.g., Winters v. Ariz. Bd. of Educ.*, 207 Ariz. 173, 177, en 13, 83 P.3d 1114, 1118 (App. 2004) (when a challenge is not raised with specificity and addressed in the trial court, it will not generally be considered on appeal) .

¶16 Finally, Rosenberg contends that, with respect to the river-running business, the Tribe entered into a self-determination Contract under the Indian Self Determination and Education Assistance Act ("ISDEAA"), 25 United States Code ("U.S.C.") section 450 et seq., which resulted in a waiver of sovereign immunity. 25 U.S.C. § 450n(1), however, makes clear that, "[n]othing in this subchapter shall be construed as . . . affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." Any immunity waived by the ISDEAA is that of the federal government as established by Congress's amendment of the ISDEAA in 1988, codified at 25 U.S.C. § 450m-1(a), which states:

> The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter.

(Emphasis added). Thus, even assuming *arguendo* that a self-determination contract exists that has some connection with the rafting operations at issue

here, it would not constitute a waiver of the Tribe's immunity.

IV. CONCLUSION

¶17 The superior court properly granted the Tribe's motion to dismiss. We affirm.

/s/
MARGARET H. DOWNIE, JUDGE

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
DANIEL A. BARKER, Judge

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Attorneys for Defendants

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

STEVEN ROSENBERG, M.D., an individual,	)	Case No. CV2007-284
Plaintiff,	)	**ORDER**
vs.	)	(Assigned to the Honorable James E. Chavez)
HW AL'BA Y BA:J ENTERPRISES, INC., an Arizona corporation, dba Hualapai River Runners; HUALAPAI INDIAN NATION a sovereign entity, dba Hualapai River Runners; GRAND CANYON RESORT CORPORATION, a business entitty, dba Hualapai River Runners; DUGAN STEELE, an individual, and JANE	)	

DOE STEELE, husband and wife; JOHN DOES I-X; BLACK CORPORATIONS I-V,

Defendants.

Consistent with this Court's minute entry order dated December 20, 2007,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff's complaint and First Amended Complaint in the above-referenced action are hereby dismissed, with prejudice.

DONE IN OPEN COURT this 14th day of January, 2008.

/s/
Honorable James E. Chavez
Judge of Mohave Superior Court

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

HONORABLE JAMES CHAVEZ
DIVISION IV
DATE: December 20, 2007

COURT ORDER

STEVEN ROSENBURG, M.D.
Plaintiff,

vs. No. CV-2007-284

HWAL'BAY BA:J
ENTERPRISES, et al.,
Defendant.

On October 10, 2007, this Court heard oral arguments on a motion to dismiss filed by the Hualapai Indian Nation. On October 16, 2007 the Court granted defendant's motion. Meanwhile, on October 12, 2007, plaintiff filed an amended complaint.

On October 24, 2007 defendant Hualapai Indian Nation filed a motion to strike the amended complaint. Plaintiff responded on November 2, 2007 and defendant replied.

The Court finds the amended complaint and the motion to strike moot.

IT IS ORDERED affirming the order dismissing this matter.

IT IS FURTHER ORDERED dismissing the first amended complaint with prejudice.

cc:

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Honorable James Chavez
Division IV

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

HONORABLE JAMES CHAVEZ
DIVISION IV
DATE: October 16, 2007

COURT RULING

STEVEN ROSENBURG, M.D.
Plaintiff,

vs. No. CV-2007-284

HWAL'BAY BA:J
ENTERPRISES, et al.,
Defendant.

On August 7, 2007 the Hualapai Indian Nation filed a motion to dismiss. After the response and reply were filed, the Court heard oral arguments on October 10, 2007.

After review of the pleadings and arguments of the parties;

IT IS ORDERED granting the motion to dismiss on the grounds that the Hualapai Indian Nation is absolutely immune from suit in state court. Morgan v. Colorado River Indian Tribe 103 Ariz.

425, 443 P.2d 421 (1968); Filer v. Tohono Odham Nation Gaming Enterprises 212 Ariz. 167, 129 P.2s 78 (App. 2006).

cc:

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

STEVEN ROSENBERG, M.D., an individual,	)	Case No. CV2007-284
Plaintiff,	)	**COMPLAINT**
vs.	)	(Tort – Non-motor vehicle)
HW AL'BA Y BA:J ENTERPRISES, INC., an Arizona corporation, dba Hualapai River Runners; HUALAPAI INDIAN NATION a sovereign entity, dba Hualapai River Runners; GRAND CANYON RESORT CORPORATION, a business entitty, dba Hualapai River Runners; DUGAN STEELE,	)	

an individual, and JANE)
DOE STEELE, husband and wife;)
JOHN DOES I-X; BLACK)
CORPORATIONS I-V,)
)
Defendants.)
)

Plaintiff Steven Rosenberg, M.D. ("Dr. Rosenberg"), for his complaint against Defendants, states as follows:

1. Dr. Rosenberg is an individual who resides in the State of Illinois.

2. Defendant Hwal'bay Ba:j Enterprises, Inc. is, upon information and belief, a corporation organized under the laws of the State of Arizona. Upon information and belief, it does business as the Hualapai River Runners.

3. Defendant Grand Canyon Resort Corporation is, upon information and belief, a business entity doing business as Hualapai River Runners.

4. Defendant Hualapai Indian Nation is a sovereign entity within the United States of America. Upon information and belief, it is the sole or primary owner of Hwal' bay Ba:j Enterprises, Inc. and/or Grand Canyon Resort Corporation, and does

business as Hualapai River Runners either directly or through one of its wholly-owned business entities.

5. Upon information and belief, Defendant Dugan Steele is an individual who resides in Mohave County, Arizona. Upon further information and belief, Defendant Steele was employed by the Hualapai River Runners.

6. Jane Doe Steele is, upon information and belief, Defendant Dugan Steele's spouse. All of Defendant Dugan Steele's acts or omissions complained of herein were undertaken for the benefit of the marital community. Jane Doe Steele is named herein solely to comply with the community property laws of the State of Arizona.

7. Defendants John and Jane Does I-X, on information and belief, are married and residing in Mohave County, Arizona, and at all times relevant hereto were acting in furtherance of their marital communities. Said Defendants have, upon information and belief, helped to cause the incidents alleged herein. The true names of John and Jane Does I-X are not known but will be provided to this Court as they are learned.

8. Defendants Black Corporations I-V, on information and belief, are entities which operate in and have substantial ties to Mohave County, State of Arizona. Said Defendants have, upon information and belief, helped to cause the incident or accident

alleged herein. The true names of Black Corporations I-V are not known but will be provided to this Court as they are learned.

9. On or about June 22, 2005, Defendants caused an event to occur in Mohave County, Arizona. The amount in controversy exceeds the jurisdictional threshold of this Court. Accordingly, jurisdiction and venue are proper in the Superior Court for Mohave County.

10. The Hualapai River Runners operate river raft tours of the Colorado River. The Colorado River is not located within the Hualapai Indian Reservation. Rather, the river is located within property owned and operated by the United States Government, including the Grand Canyon National Park.

11. Upon information and belief, the Hualapai River Runners do not have a permit to operate a river tour or other commercial enterprise within the Grand Canyon National Park, although required by the Code of Federal Regulations.

12. Upon further information and belief, the government of the United States, through the National Park Service, has entered into an agreement with the Hualapai River Runners that they may operate a river tour within the Grand Canyon National Park without a permit and without consideration of river tour quotas, an agreement

promoting the tribe's self-determination. *See generally* **25 U.S.C. § 450f.**

13. Upon further information and belief, the Hualapai River Runners are covered by liability insurance pursuant to this self-determination agreement between the National Park Service and the Hualapai tribe. *Id.*

14. Dr. Rosenberg and his son purchased a river tour from the Hualapai River Runners and, on June 22, 2005, Dr. Rosenberg participated in a guided river tour conducted by the Hualapai River Runners.

15. Dugan Steele was the tour guide and pilot of the boat in which Dr. Rosenberg and his son were passengers.

16. At the 232 Mile Rapids, the boat capsized. Dr. Rosenberg was thrown from the boat. The propeller of the boat struck both his head and left hand. Dr. Rosenberg sustained serious injury.

17. The 232 Mile Rapids and the location of the accident at issue was not within the geographic confines of the Hualapai Indian Reservation or Nation.

18. Defendants owed a duty of care to its customers, including Dr. Rosenberg. Defendants breached this duty of care by, among other things,

a. Failing to provide information to customers about what to do in the event of a raft capsizing;

b. Failing to operate the raft in a reasonable and safe manner, including most specifically, steering the raft into a large rock in the rapids known as "Honeymoon Rock," causing the boat to partially capsize and high center on the rock;

c. Failing to carry appropriate medical supplies, bringing only a small home medical kits containing only a few bandages and a rotten onion;

d. Failing to train their personnel in emergency medical care;

e. Failing to have procedures and equipment for timely treatment and evacuation of injured persons; and

f. Failing to utilize a "deadman control" or "kill switch" to stop the boat's propeller in the event of an accident or capsize.

19. As a direct and proximate cause of Defendants' negligence as described herein, Dr. Rosenberg was injured. He sustained serious injury,

incurred medical expenses, as well as emotional distress, trauma, loss of income, loss of earning capacity, and loss of enjoyment of life.

WHEREFORE, Dr. Rosenberg prays for judgment as follows:

A. An amount to compensate Plaintiff, for his past and future medical expenses incurred as a result of the subject accident;

B. An amount to compensate Plaintiff for past and future lost wages and loss of earning capacity;

C. General damages in an amount to compensate for his personal injuries, pain, suffering, and anguish;

D. For taxable costs and pre-and post-judgment interest to the extent permitted by law; and

E. Such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 14th day of February, 2007.

ROBBINS & CURTIN, p.l.l.c.

By _____/s/_____
Joel B. Robbins
Attorney for Plaintiff

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

STEVEN ROSENBERG, M.D., an individual,	)	Case No. CV2007-284
Plaintiff,	)	**FIRST AMENDED COMPLAINT**
vs.	)	
HW AL'BA Y BA:J ENTERPRISES, INC., an Arizona corporation, dba Hualapai River Runners; HUALAPAI INDIAN NATION a sovereign entity, dba Hualapai River Runners; GRAND CANYON RESORT CORPORATION, a business entitty, dba Hualapai River Runners; DUGAN STEELE,	)	(Assigned to the Honorable James E. Chavez)

an individual, and JANE DOE STEELE, husband and wife; JOHN DOES I-X; BLACK CORPORATIONS I-V,

Defendants.

Plaintiff Steven Rosenberg, M.D. ("Dr. Rosenberg"), for his complaint against Defendants, states as follows:

1. Dr. Rosenberg is an individual who resides in the State of Illinois. He is a podiatrist, and is left-handed. He requires use of his left hand to perform surgery and other medical procedures.

2. Defendant Hwal'bay Ba:j Enterprises, Inc. is, upon information and belief, a corporation organized under the laws of the State of Arizona. Upon information and belief, it does business as the Hualapai River Runners.

3. Defendant Grand Canyon Resort Corporation is, upon information and belief, a business entity doing business as Hualapai River Runners.

4. Defendant Hualapai Indian Nation is a sovereign entity within the United States of America. Upon information and belief, it is the sole or primary owner of Hwal' bay Ba:j Enterprises, Inc.

and/or Grand Canyon Resort Corporation, and does business as Hualapai River Runners either directly or through one of its wholly-owned business entities.

5. Upon information and belief, Defendant Dugan Steele is an individual who resides in Mohave County, Arizona. Upon further information and belief, Defendant Steele was employed by the Hualapai River Runners.

6. Jane Doe Steele is, upon information and belief, Defendant Dugan Steele's spouse. All of Defendant Dugan Steele's acts or omissions complained of herein were undertaken for the benefit of the marital community. Jane Doe Steele is named herein solely to comply with the community property laws of the State of Arizona.

7. Defendants John and Jane Does I-X, on information and belief, are married and residing in Mohave County, Arizona, and at all times relevant hereto were acting in furtherance of their marital communities. Said Defendants have, upon information and belief, helped to cause the incidents alleged herein. The true names of John and Jane Does I-X are not known but will be provided to this Court as they are learned.

8. Defendants Black Corporations I-V, on information and belief, are entities which operate in and have substantial ties to Mohave County, State of Arizona. Said Defendants have, upon information

and belief, helped to cause the incident or accident alleged herein. The true names of Black Corporations I-V are not known but will be provided to this Court as they are learned.

9. On or about June 22, 2005, Defendants caused an event to occur in Mohave County, Arizona. The amount in controversy exceeds the jurisdictional threshold of this Court. Accordingly, jurisdiction and venue are proper in the Superior Court for Mohave County.

10. The Hualapai River Runners operate river raft tours of the Colorado River as a commercial enterprise. The Colorado River is not located within the Hualapai Indian Reservation. Rather, the river is located within property owned and operated by the United States Government, including the Grand Canyon National Park.

11. Upon information and belief, the Hualapai River Runners do not have a permit to operate a river tour or other commercial enterprise within the Grand Canyon National Park, although required by the Code of Federal Regulations.

12. Upon further information and belief, the government of the United States, through the National Park Service, has entered into an agreement with the Hualapai River Runners that they may operate a river tour within the Grand Canyon National Park without a permit and without

consideration of river tour quotas, an agreement promoting the tribe's self-determination. *See generally* 25 U.S.C. § 450f.

13. Upon further information and belief, the Hualapai River Runners are covered by liability insurance pursuant to this self-determination agreement between the National Park Service and the Hualapai tribe. *Id.*

14. Acting through his travel agent in or near Chicago, Dr. Rosenberg and his son purchased a river tour from the Hualapai River Runners. As part of his decision-making process, Dr. Rosenberg reviewed various brochures by the Hualapai River Runners, including, he believes, the brochure set forth in Exhibit 1. Other materials that were review by either Dr. Rosenberg or his travel agent include those set forth in Exhibits 2 and 3.

15. On or about June 21, 2005, Dr. Rosenberg and his son traveled to the Hualapai Indian Reservation. The next morning, they participated in the rafting tour conducted by the Hualapai River Runners.

16. Before they were permitted to leave for the tour, the River Runners required Dr. Rosenberg and his son to sign a form entitled "Assumption of Risk and Responsibility and Release of Liability." A true and correct copy of this form is attached hereto as Exhibit 4.

17. In this form, the tribe required the tour participants to acknowledge that "there are inherent dangers in this activity," and that they released the tribe of any liability as a result of these inherent risks. The Release specifically states that "I have read the foregoing acknowledgement of risk, assumption of risk and responsibility, and release of liability. I understand that by signing this document I may be waiving valuable legal rights." Id. (emphasis added).

18. Nowhere in this form does the tribe indicate that either it believes it has "sovereign immunity" and therefore, the tour participants had (according to the tribe) no "legal rights" even without executing the Release form.

19. Dugan Steele was the tour guide and pilot of the boat in which Dr. Rosenberg and his son were passengers. The Rosenbergs shared a raft with six members of the Molloy family.

20. At the 232 Mile Rapids, Dugan Steele steered the boat directly towards a rock on the north side of the River. He made no attempt to steer the raft around the rock, and the raft struck the rock at a considerable rate of speed. *See* Exhibit 5.

21. The Rosenbergs, two guides, and two of the Molloys were thrown out of the raft.

22. Dr. Rosenberg was thrown from the boat. None of the guides had a "kill switch" for the boat's engine, and the boat's propeller struck both Dr. Rosenberg's head and left hand at full speed. His injuries were clearly serious. *See* Exhibit 6.

23. The 232 Mile Rapids and the location of the accident at issue was not within the geographic confines of the Hualapai Indian Reservation or Nation.

24. Despite their assurances in publicity brochures, the River Runners were ill prepared to deal with Dr. Rosenberg's injury. In fact, it was other passengers, and not the guides, who provided assistance to Dr. Rosenberg.

25. One passenger described Dr. Rosenberg's treatment as follows:

> The guides and I'm only telling you this because I was just appalled by it, he went, I said do you have a first aid kit, he needs to wrap, his hand needs to be wrapped. They found the first aid kit, or were looking for it or something, and he said yea, we have an Advil, give him an Advil. And I remember to myself, just sitting there, and I was still m shock, I was going, okay, you're kidding me, I mean, we didn't know if his airways were open at the time, I mean that was their idea of first aid.

Exhibit 5; *see also* Exhibit 7 (noting that the first aid kit was simply a "household" kit, with no bandages to wrap Dr. Rosenberg's hand).

26. Defendants owed a duty of care to its customers, including Dr. Rosenberg. Defendants breached this duty of care by, among other things,

a. Failing to provide information to customers about what to do in the event of a raft capsizing;

b. Failing to operate the raft in a reasonable and safe manner, including most specifically, steering the raft into a large rock in the rapids known as "Honeymoon Rock," causing the boat to partially capsize and high center on the rock;

c. Failing to carry appropriate medical supplies, bringing only a small home medical kits containing only a few bandages and a rotten onion;

d. Failing to train their personnel in emergency medical care;

e. Failing to have procedures and equipment for timely treatment and evacuation of injured persons; and

f. Failing to utilize a "deadman control" or "kill switch" to stop the boat's propeller in the event of an accident or capsize.

27. As a direct and proximate cause of Defendants' negligence as described herein, Dr. Rosenberg was injured. He sustained serious injury, incurred medical expenses, as well as emotional distress, trauma, loss of income, loss of earning capacity, and loss of enjoyment of life.

WHEREFORE, Dr. Rosenberg prays for judgment as follows:

A. An amount to compensate Plaintiff, for his past and future medical expenses incurred as a result of the subject accident;

B. An amount to compensate Plaintiff for past and future lost wages and loss of earning capacity;

C. General damages in an amount to compensate for his personal injuries, pain, suffering, and anguish;

D. For taxable costs and pre-and post-judgment interest to the extent permitted by law; and

E. Such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 11th day of October, 2007.

ROBBINS & CURTIN, p.l.l.c.

By /s/
Joel B. Robbins
Attorney for Plaintiff

ORIGINAL of the foregoing FedEx'ed this 11th day of October, 2007, to:

Clerk of the Court
Mohave County Superior Court
401 E. Spring Street
P.O. Box. 7000
Kingman, Arizona 86402

and a copy mailed to:

Honorable James E. Chavez
Mohave County Superior Court
401 E. Spring Street
P.O. Box. 7000
Kingman, Arizona 86402

Theodore A. Julian, Jr., Esq.
BURCH & CRACCHIOLO, P.A.

702 East Osborn Road
Phoenix, Arizona 85014
Attorney for Defendant

By /s/

**EXHIBIT 1 TO FIRST AMENDED COMPLAINT,
COLOR BROCHURE RE.
HUALAPAI RIVER RUNNERS,
OMITTED**

EXHIBIT 2 TO FIRST AMENDED COMPLAINT

Gam'Yu? (Hello, How Are You?)
The Hwal'Bay BaJ, People of the Pine, welcomes You. Thank you for your interest in the one-day whitewater rafting in which you will experience a very natural 42-mile river trip 011 the Colorado River through the lower Granite Gorge of the Grand Canyon. All trips will launch from Diamond Creek Point, River Mile 226, approximately 19.9 miles north of Peach Springs.

DrIve into the Grand Canyon
The ride from Peach Springs to Diamond Creek Beach will be a 45-minute bus rides down Diamond Creek Road. Travel on this maintained dirt road is somewhat rough, so expect a rugged ride. The elevation at Diamond Creek Beach is 1,374 feet with beautiful scenery and occasional wildlife. Traveling down you will enjoy the natural wonder of the Grand Canyon walls emerging as you make the gradual descent downward.

Rafting on the Colorado River
On the one-day whitewater adventure, you will be traveling within the Grand Canyon on the Colorado River with Native experienced boatmen or boatwomen. You will experience rapids within the first 15 miles. These rapids are adventurous enough for those of you who thrill seekers, yet those who may be a little timid, no need to worry; your boatperson will have your safety and enjoyment in

mind. The rapids are ranked as Class 3 and Class 4 on a grade scale of 1 to 6, with 6 being the most adventurous. Rapid ranking is based upon level of water.

Your first stop is Travertine Cavern Falls where you will experience a moderate trek, with short climb, up into the cavern that can be challenging to some. After Travertine, you will experience more rapids and which you will enjoy lunch along a sandy beach a, which includes sub-type sandwiches with various cold cuts. Water, soda, juices, and snacks are provided along the way. After this short break, the last 25 miles of the river trip will be a relaxing smooth float.

Upon your arrival at Quartermaster Beach, which is directly below Grand Canyon West, river rafters will trek up to helipads. Each of our rafters will take a helicopter ride up 4,000 feet to the Grand Canyon West Terminal all the while enjoying the unique and wondrous view of the Grand Canyon and Colorado River. (Those who wish to skip the helicopter ride will continue another 2 ~ hours smooth float to South Cove and must notify Hualapai River Running upon making your reservation.) Once all rafters are up at the terminal you may visit the Grand Canyon West terminal facilities thereafter, your bus driver will transport all river rafters to the Hualapai Lodge.

Return Trip To Peach Springs

Traveling by bus you will cover 85 miles to the Hualapai Lodge in Peach Springs. Three quarters of the drive back is on maintained dirt roads where you will experience dust, heat and an occasional non-typical windstorm. You will also experience a very natural ride traveling through the Joshua Tree Forest and Red Lake, a dry lakebed with an expanse of over 20 by 40 miles. The entire return trip will take at least one hour and 45 minutes to two hours.

Once you arrive at the Lodge you will receive a complimentary River Running mug. Those who are staying at the Hualapai Lodge can enjoy a comfortable stay with a restaurant, fitness room, and saltwater pool and spa. The Hualapai Lodge offers day showers for $10 per person and travelers continuing on are welcome to the showers with towel, shampoo and lotion.

ANSWERS TO COMMON QUESTIONS

WHEN AND WHERE WILL I GET MY RIVER EQUIPMENT?

A waterproof bag, waterproof ammo can and life jacket will be distributed at the launch site. Know as Diamond Creek, it is also where your Guide will orientate you on your white-water rafting adventure.

WILL I NEED ALL THE THINGS LISTED ON THE PACKING LIST?

Our recommended list of personal gear is meant to prepare you for all types of weather and especially the strong Arizona sun. Although we are in Arizona, the cool Fall temperatures coupled with the cold Colorado River can make a chilly ride. Remember, you will be on the River at least five hours.

WHAT ABOUT SNAKES AND BUGS?

Although we are in a desert environment, mosquitoes and flying insects are not a big problem. And because we spend most of our time on the water, snakes and scorpions are seldom encountered.

DO I HAVE TO WEAR MY LIFE JACKET EVEN WHEN WE ARE NOT RUNNING THE RAPID?

Hualapai Tribal Regulations as well as National Park Regulations mandate the wearing of life jackets by all persons in a watercraft at all times.

WHAT ARE THE TOILET FACILITIES ON THE RIVER TRIP?

Potable toilets are available at Diamond Creek, the launch point. Restroom facilities are also available in the Hualapai Lodge and at Grand Canyon West, the trip termination point. We strongly recommend using the restrooms facilities at the Lodge and launch site.

CAN WE EXPECT RAIN?

We never know when it will rain! Even if you are taking a summer trip, you should bring rain gear. As suggested on our packing list. Many people wear

a rain jacket/poncho through the rapids and then take it off after our run through the rapids.

WHAT IS THE MEAL LIKE AND WHAT BEVERAGES ARE PROVIDED?

Water, juice, soft drinks and snacks will be provided throughout the trip. Each raft carries an ice chest of drinks and snacks. Hoagie subs and chips will be served for lunch at noontime. Alcohol is not allowed.

WHO WILL BE OUR GUIDE?

Our guides/boat persons are qualified with hundreds of miles of river experience. Each guide is an accomplished outdoor person with a background in natural history and the ability to make every trip a memorable experience.

WILL THERE BE A FIRST AID KIT?

A first aid kit is standard equipment on every raft. All boatpersons are trained inj CPR, First Aide and Swift Water Rescue.

IS THIS TRIP STRENUOUS?

Our trip is an out-door activity with exposure to the elements; we consider our trip to be mildly strenuous, requiring some effort.

Hualapai River Running
Trip Information

Whitewater Rafting

WEATHER

The followIng chart shows average temperatures and precupatatoon for the months of March through October. The water temperature is between 45~41 degrees year round. In the months of March and April, and September and October, our Arizona weather is cooler. We recommend you dress in layers during these months so you can remove clothing as you chose. You will get wet after you run the rapids, light rain gear is also recommended.

The Arizona sun is strong, so you'll need protection against sunburn. A good hat, sunglasses, lip balm and lots of sun block (with 30SPF) are recommended.

Inner Grand Canyon - Average Temperatures (in Fahrenheit:) and Precipitation:

	MARCH	APRIL	MAY	JUNE	JULY	AUGUST	SEPT	OCTOBER
Average Max temp	70	89	89	101	106	101	96	86
Average Min Temp	46	56	60	71	79	74	70	59
Rainfall in inches	0.66	0.38	0.22	0.38	0.78	1.22	0.43	0.49

PERSONAL GEAR AND PACKING LIST

In preparation for your rafting trip on the Colorado River in the Grand Canyon, we recommend the following personal gear for protection from water

and sun; light weight, fast drying material is recommended as well:

Shorts	Extra Socks/Shoes
T-Shirt	Swimsuit-Optional
Hat with Visor and Strap	Bandana
Rain Jacket/Phocho/ Grotex	Towel
River Sandals/Athletic Shoes	Sun Block-SPF 30+
Lightweight Jacket	Disposal Camera
Lightweight Pants	Money
Sunglasses with Strap	Binoculars

Cameras/Binoculars - We recommend keeping your items in water proof bags, even when items are placed in the Ammo Cans we supply. Disposable and/or water proof digital cameras are excellent choices for your trip.

Video Cameras - Since there is no place to recharge batteries we recommend you bring extra batteries. We also suggest you check with your local sporting goods or camera store for a waterproof bag.

Gratuities - It is customary upon receiving a satisfactory trip, to tip the river crew. We recommend a small back pack or fanny pack to keep your money safe!

EXHIBIT 3 TO FIRST AMENDED COMPLAINT

Hualapai River Running

Grand Canyon Resort Corporation
863 Route 66 * Post Office Box 246 * Peach Springs *
Arizona 86434-0246
Phone (928) 769-2219
Fax (928) 769-2637
www.grandcanyonresort.com

January 17,2006

Attn: Elaine
Gray's Travel
60 Revere Drive
Northbrook, IL 60062

Enclosed is the information you have requested. Your Colorado River/Grand Canyon Adventure will take place on the sovereign lands of the Hualapai Nation.

Your safety and convenience for a thrilling and unforgettable whitewater rafting experience is our ultimate goal. We look forward to your arrival on the nearly 1,000,000-acre Colorado Plateau Homeland of the Hualapai Indian Nation.

Please keep in mind the completion for the skywalk has been moved to July 2006. The skywalk is currently under construction. If you would like more

information on the skywalk you can go to www.destinationgrandcanyon.com or you can call to the Grand Canyon West at 1-928-699-0269.

If you have any other questions please feel free to contact our office at the numbers above. Thank you!

Sincerely,

Rachelle Mahone,
Hualapai River Running Concierge

Enclosures:
CANCELLATION POLICY: Must be made 30 days prior to your river trip date to receive full refund. Cancellations less than the 30 day period, we will withhold $50.00 per person to cover reservations costs.

EXHIBIT 4 TO FIRST AMENDED COMPLAINT

ASSUMPTION OF RISK AND RESPONSIBILITY AND RELEASE OF LIABILITY

WARNING: There are significant elements of risk in any adventure or activity associated with whitewater rafting and incidental camping including but not limited to the use of kayaks, oar boats, motorized or non-motorized (referred to herein as "activity") and the use of any related equipment.

ACKNOWLEDGEMENT OF RISKS: I realize that there are inherent dangers in this activity including but not limited to the following: 1) Changing water flow or current; 2) collision with other participants, any portion of the interior of the craft, other watercraft or natural objects, including overhanging, submerged and/or semi-submerged trees, branches, rocks and boulders; 3) Inclement weather, variances and extremes of wind, weather and temperatures, the presence of insects and animals; 4) loss of control of craft, my sense of balance, physical coordination, ability to swim, and/or follow directions; 5) collision, capsizing, and sinking of the craft, which can result in wetness, injury, exposure to the elements, hypothermia, and/or drowning; 6) getting in or out of the craft; 7) travel, including hiking, portaging and travel to or from the activity.

I acknowledge that I may suffer injury or illness or medical emergencies in remote places where there are no available medical facilities. I realize that personal property may be lost or damaged, that certain foreseeable and unforeseeable events can contribute to the unpredictability of the risks, dangers and hazards of the activity; that wearing a helmet may be a basic precaution; and that I should ask about potential risks, dangers and hazards and recommended precautions and procedures. I acknowledge and accept that wearing a U.S. Coast Guard approved flotation device while in or upon any craft is a basic safety precaution and is required.

EXPRESS ASSUMPTION OF RISK AND RESPONSIBILITY: In recognition of the inherent risks of the activity when I and minor children for which I am responsible, will engage in, I confirm that I am (we are) physically and mentally capable of participating in the activity and using the equipment. I/We participate willingly and voluntarily and I assume full responsibility for personal injury accidents or illness, including death. I assume all responsibility for damage to or loss of personal property while participating in this activity.

I assume the risk(s) of personal injury, accidents and/or illness; and acknowledge that if, during the activity, I/We experience fatigue, chill and/or dizziness, my/our reaction time may be diminished and the risk of an accident increased.

COVENANT OF GOOD FAITH: I recognize that you, as provider of goods and/or services, will operate under good faith and fair dealing, but that you may find it necessary to terminate an activity due to forces of nature, medical necessities or other problems for the safety of myself and/or other participants. I acknowledge that no guarantees have been made with respect to achieving objectives.

AUTHORIZATION AND AGREEMENT: I hereby authorize any medical treatment deemed necessary in the event of any injury while participating in the activity. I either have appropriate insurance or, in its absence, agree to pay all costs or rescues and/or medical services as may be incurred on my/our behalf. I agree that any film or photographs of me/us as participants become your property and may be used for promotional or commercial purposes.

RELEASE: In consideration of services or property provided, I, and any minor children for which I am parent, legal guardian or otherwise responsible, any heirs, personal representatives or assigns, do hereby release:

THE HUALAPAI TRIBE AND ITS BUSINESS CORPORATION HAWL'BAY BA:J ENTERPRISES, INC. DOING BUSINESS AS GRAND CANYON RESORT CORPORATION

Its council members, principals, directors, officers, agents, employees and volunteers, from all liability and waive any claim for damage arising from any cause whatsoever.

I have read the foregoing acknowledgement of risk, assumption of risk and responsibility, and release of liability. I understand that by signing this document I may be waiving valuable legal rights.

Participant's Name (printed): Steven Rosenberg
Age 47 Date of Trip: 6-22-05

Address: [redacted]

Country: _____ Emergency contact: [redacted]

Signature /s/ Steven Rosenberg
If participant is under 18, the parent/legal guardian must sign

WEIGHT OF PARTICPANT (for helicopter) 180

HRR 07/08/03

EXHIBITS 5-7 TO FIRST AMENDED COMPLAINT (Interviews of tour participants and investigative summary), OMITTED

Supreme Court, U.S.
FILED
FEB 24 2010
OFFICE OF THE CLERK

No. 09-743

In The
Supreme Court of the United States

STEVEN ROSENBERG,

Petitioner,

v.

HUALAPAI INDIAN NATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Applying this Court's decision in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), which held that an Indian Tribe enjoys sovereign immunity even for its off-reservation, commercial conduct, does the Hualapai Tribe enjoy such sovereign immunity?

(2) Although "[i]t is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed,'" *e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978), should a release signed only by the Petitioner before he was injured, which expressly releases the Hualapai Indian Nation from any liability, be somehow interpreted as an implied waiver by the tribe of its sovereign immunity?

ALL PARTIES TO THE PROCEEDINGS

The caption to the case contains the names of all parties who participated in the appeal below. Hwal'Bay Ba:J Enterprises, Inc., Grand Canyon Resort Corporation, and Dugan Steele, were named as defendants in the plaintiff's complaint, but were never served.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Mohave County Superior Court dismissed the complaint and the amended complaint on the basis of sovereign immunity. Its orders are unpublished. Clerk's Record 15, 19. The Arizona Court of Appeals affirmed dismissal on the basis of sovereign immunity. Pet. App. 5-17. That opinion is also unpublished, but can be accessed electronically. *See Rosenberg v. Hualapai Indian Nation*, 2009 WL 757436 (Ariz. Ct. App. Mar. 24, 2009). In another unpublished order, the Arizona Supreme Court declined to review the Arizona Court of Appeals' decision. Pet. App. 1-2.

JURISDICTION

The case was disposed of in the Arizona Court of Appeals and Supreme Court of Arizona. The Petitioner is mistaken that jurisdiction exists pursuant to 28 U.S.C. § 1245(1).

STATUTORY PROVISION INVOLVED

The Petition (at 4-7) states that no Constitutional or statutory provisions are involved, then quotes only a federal regulation, which is not addressed at all in

the argument stating the reasons Petitioner believes review should be granted.

STATEMENT OF THE CASE

Respondent, the Hualapai Indian Nation (the "Tribe"), is a federally-recognized Indian tribe located on the Hualapai Indian Reservation in northwestern Arizona. The Reservation was established by an Executive Order of President Arthur on January 4, 1883, consists of approximately 1 million acres of land held by the United States in trust for the Tribe, and is the home of approximately 1,350 tribal members. *See United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 356-58 (1941) (holding that the Executive Order establishing the Reservation extinguished the Tribe's aboriginal title outside the Reservation). The Executive Order established the northern boundary of the Reservation as running "along [the Colorado] River" for 108 miles, most of which are in the Grand Canyon.

Petitioner Rosenberg traveled to the Reservation on June 21, 2005, and the next morning contracted with Hualapai River Runners[1] for a day-long white

[1] The Tribe operates Hualapai River Runners through its wholly-owned tribal enterprises. Clerk's Record 7. Hualapai River Runners is a day-long white water rafting operation down the Colorado River from docks on the southern bank of the river on the Reservation. The tribally-owned enterprise is a central

(Continued on following page)

water rafting trip. Pet. at 10. Petitioner purchased a ticket for the trip and was required as a condition of taking the trip to sign an "Assumption of Risk and Responsibility and Release of Liability" (the "Release"). Pet. at 10; Pet. App. 53-57. Among other things, the Release states:

> RELEASE: In consideration of services or property provided, I, and any minor children for which I am parent, legal guardian or otherwise responsible, any heirs, personal representatives or assigns, do hereby release:
>
> THE HUALAPAI TRIBE AND ITS BUSINESS CORPORATION, HWAL'BAY BA:J ENTERPRISES, INC. DOING BUSINESS AS GRAND CANYON RESORT CORPORATION.
>
> Its council members, principals, directors, officers, agents, employees and volunteers, from all liability and waive any claim for damage arising from any cause whatsoever.
>
> I have read the foregoing acknowledgment of risk, assumption of risk and responsibility, and release of liability. I understand that by signing this document I may be waiving valuable legal rights.

Petitioner's Release also acknowledged that "there are inherent dangers in this activity" of white water

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feature of the Tribe's efforts to provide employment for its members and attain economic self-sufficiency.

river rafting. Petitioner was injured when he fell out of a boat while rafting on the Colorado River with the Hualapai River Runners. Clerk's Record 1 at ¶ 1, 16.[2]

Petitioner filed suit against the Tribe in the Mohave County Superior Court on February 16, 2007. Clerk's Record 1. Pet. App. 24-31.[3] Petitioner named, but did not serve Hualapai River Runners, which is not a party to this suit.

The trial court dismissed the case on the basis of sovereign immunity. Pet. App. 22-23. The Arizona Court of Appeals affirmed in an unpublished memorandum decision. Relying on allegations in Petitioner's Complaint, the Court of Appeals "assume[d] that [Petitioner] . . . was injured outside the geographic boundaries of the Tribe's reservation." Pet. App. 6-7. The Court of Appeals held that the Tribe has sovereign immunity for torts occurring off of the

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[2] There is a historical dispute between the Tribe and the federal government regarding the boundaries of its Reservation (the river bank or middle of the river) and current federal regulations exempt the Tribe from any regulations regarding rafting on the Colorado River. *See* 36 C.F.R. § 7.4(b). Whether Petitioner's accident occurred "off-reservation" because he fell out of the boat closer to the north bank, rather than the south bank of the river, is a fact question that need not be resolved here. The state court accepted as true Petitioner's allegation that the accident occurred off-reservation, basing its holding on the Tribe's immunity from suit.

[3] Initially, Petitioner filed suit in tribal court, but voluntarily dismissed that action. He then filed a state court complaint which abated for non-service, before he filed the complaint resulting in these proceedings. Pet. App. 8 n.1.

Reservation, relying on this Court's decision in *Kiowa Tribe v. Manufacturing Technologies Inc.*, 523 U.S. 751 (1998), and that the Tribe did not waive its immunity by requiring the plaintiff to sign a release form before participating in the river rafting trip, Pet. App. 13-15, relying on this Court's decisions in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), both of which hold that any waiver of a Tribe's immunity must be clearly expressed. The Arizona Supreme Court declined discretionary review. Pet. App. 1.

REASONS FOR DENYING THE PETITION

I. The Decision Below Is Consistent with Almost Two Centuries of this Court's Jurisprudence Upholding Tribal Sovereignty.

Petitioner presents no circuit split nor any state court decision that is repugnant to any Constitutional provision, treaty, or federal statute. Petitioner merely disagrees with the existence of tribal sovereign immunity as applied by the Court in *Kiowa*.

For "nearly two centuries," Indian tribes have been recognized as sovereign nations. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2718 (2008). Inherent in that sovereignty is the affirmative defense of sovereign immunity. *United States v. USF&G Co.*, 309 U.S. 506, 512-13 (1940).

Petitioner acknowledges (at 15-16) this Court's long-standing recognition of the existence of tribal sovereign immunity. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).[4] Most recently, the Court held that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

This Court has consistently held that the immunity doctrine protects tribes against suit in state courts. *E.g., Kiowa*, 523 U.S. at 755-56; *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 510; *Puyallup Tribe*, 433 U.S. at 172-173. In *Kiowa* the Court applied the rule that "tribal immunity is a matter of federal law and is not subject to diminution by the States" and held that a tribe could not be sued in state court in a contract action absent its consent or congressional authorization. 523 U.S. at 756.

In *Puyallup Tribe*, which involved the exercise of treaty fishing rights by tribal members, the Court also applied the principle that, "[a]bsent an effective waiver or consent, it is settled that a state court may

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[4] Since *Worcester*, this Court has recognized the existence of tribal sovereign immunity in every decision on this subject. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Dept. of Game*, 433 U.S. 165 (1977); *United States v. USF&G Co.*, 309 U.S. 506, 512 (1940).

not exercise jurisdiction over a recognized Indian tribe." 433 U.S. at 172. The Court consequently invalidated a Washington state court order directing the Tribe to file with the court a list of tribal members authorized to exercise treaty fishing rights and the number of fish caught by such fisherman because it infringed on the Tribe's sovereign immunity and exceeded the state court's jurisdiction.

In *Citizen Band Potawatomi*, the Court explained that:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes . . . Congress has consistently reiterated its approval of the immunity doctrine. *See, e.g.,* Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.* These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

498 U.S. at 510.

Kiowa reaffirmed that tribal sovereign immunity is "settled law" and declined an invitation to revise it, citing Congress' past reliance on the doctrine and power to alter it. 523 U.S. at 758-59. Congress has continued to take an active role in assessing the tribal immunity doctrine. While Congress has amended a prior statute to require that certain tribal contracts waive or otherwise address tribal immunity, *see* 25 U.S.C. § 81, *amended by* Indian Tribal Economic Development and Contract Encouragement Act, Pub. L. No. 106-179, § 2, 114 Stat. 46 (2000),[5] it has otherwise reaffirmed that tribal immunity should continue to apply with full force, *see* Tribal Self-Governance Amendments, Pub. L. No. 106-260, § 516, 114 Stat. 711 (2000).[6]

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[5] In the amendment, Congress provided that any tribal contract subject to the Secretary's approval must include provisions that either: (1) define remedies in the event of a breach; (2) reference tribal laws that disclose the tribe's right to assert sovereign immunity; or (3) include an express waiver of the tribe's sovereign immunity and any limitations on that waiver. 25 U.S.C. § 81(d)(2) (as amended).

[6] In this Act, Congress reaffirmed its approval of the tribal sovereign immunity doctrine by requiring that provisions of the Indian Self-Determination and Education Assistance Act, including the Act's recognition of the immunity doctrine, 25 U.S.C. § 450n, apply to tribal health programs covered by the 2000 Amendments. *See* H. REP. NO. 104-477, at 32 (1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 589.

Petitioner incorrectly claims (at 22) that *Kiowa* "was notably silent on whether immunity extended to a tribe's commercial, extra-territorial tortious conduct." To the contrary, the majority opinion in *Kiowa* specifically refused to narrow the scope of its holding in that regard: "Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. *We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.*" *Kiowa*, 523 U.S. at 758 (emphasis added). In reaching this decision, *Kiowa* did not create a new legal rule with respect to immunity.[7] Rather, it cited and followed earlier precedent. As the Court acknowledged:

> To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred. . . . Nor have we yet drawn a distinction between governmental and commercial activities of a tribe. Though respondent

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[7] "[S]tate sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens." *Federal Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 765 (2002). In the case of tribal sovereignty, commercial activities of the tribe are not distinguished from other governmental activities. "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-19 (1987) (where gaming was the commercial activity).

> asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions.

Kiowa, 523 U.S. at 754 (citing *Puyallup Tribe*, 433 U.S. at 165; *Okla. Tax Comm'n*, 498 U.S. at 505; *USF&G Co.*, 309 U.S. at 506). Accordingly, in recognizing the applicability of sovereign immunity, "nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships." *Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting).

Petitioner also acknowledges that "lower courts have consistently construed *Kiowa*" to apply to tort actions as well as those arising in contract, Pet. at 23-24 & n.3, and he does not point to any conflict between the decision below and any holding by a federal court of appeals or the highest court of any State. *See also Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes ex rel. Tribal Council*, 72 F. Supp. 2d 717, 719 (E.D. Tex. 1999); *Filer v. Tohono O'Odham Nation Gaming Enter.*, 129 P.3d 78 (Ariz. Ct. App. 2006); *Redding Rancheria v. Superior Court*, 105 Cal. Rptr. 2d 773, 776 (App. 2001); *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 637 (1999). *Beecher v. Mohegan Tribe of Indians*, 918 A.2d 880 (Conn. 2007); *Foxworthy v. Puyallup Tribe of Indians Ass'n*, 163 P.3d 53, 55 (Wash. Ct. App. 2007).

In urging that certiorari be granted, Petitioner instead relies heavily on a comment in *Kiowa*, which suggests that the broad application of immunity "can

harm those who are unaware that they are dealing with the tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." Pet. at 1 quoting *Kiowa*, 523 U.S. at 758. Petitioner is not, however, the "unwitting tort victim" referenced in *Kiowa*'s dicta. To the contrary, Petitioner was aware that he was dealing with the Hualapai tribe when he *voluntarily* purchased his tickets for the river rafting tour with the Hualapai River Runners in advance. He *knowingly* entered onto the Hualapai reservation to participate in the excursion with the tribal enterprise, knowing river rafting to be a dangerous activity. He signed a release in which the Tribe was clearly identified as the vendor. In other words, Petitioner did "have a choice in the matter" and chose to enter into a commercial transaction with the Tribe; he was not a victim of a tort outside a reservation that simply happened to be committed by a tribal enterprise where he was ignorant of its tribal character. Thus, Petitioner's case here, though framed as a tort action, did arise from a voluntary contractual relationship akin to that of the actual plaintiff in *Kiowa*, rather than the unwitting tort victim hypothesized there. Accordingly, even if *Kiowa* had left "open" the question of whether immunity applies to off-reservation torts, this case does not provide an appropriate vehicle to address that question.

In a final attempt to create the illusion of a worthy question presented, Petitioner (at 14-21) attempts to force an analogy between tribal immunity

and the immunity afforded to foreign nations pursuant to the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. § 1602 *et seq.* Tribal immunity is not identical to the immunity of foreign nations nor is it subject to any limitations that Congress may have established for claims against foreign countries in FSIA. *See* 28 U.S.C. § 1605. To the contrary, the fact that Congress chose to limit the immunity of foreign sovereigns underscores the broader immunity retained by tribal sovereigns in the absence of congressional action. For example, in *Kiowa* this Court held that tribal immunity encompasses even the commercial activities of the tribe.[8] By contrast, under FSIA, foreign sovereigns do *not* retain immunity for their commercial activities. Moreover, FSIA permits a waiver of immunity to be implied, *see* 28 U.S.C. § 1605(a)(1), while this Court has repeatedly emphasized that a waiver of tribal immunity must be express and unequivocal to be effective. *See Santa Clara Pueblo v. Martinez*, 436 U.S. at 55-56 (1978) (citations omitted) ("It is settled that a waiver of sovereign immunity 'cannot be

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[8] Congress had already passed FSIA at the time *Kiowa* was decided. The *Kiowa* Court compared and contrasted the limitations FSIA imposed on foreign sovereigns and those imposed upon tribal sovereigns through provisions of the Indian Gaming Regulatory Act (25 U.S.C. § 2701) and Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450). *See Kiowa*, 523 U.S. at 758-59. If it was appropriate to apply FSIA to tribal sovereigns, then the Court could have done so in *Kiowa*, but did not. Instead, it identified the distinct limits imposed on each by Congress and gave deference to those legislative enactments.

implied but must be unequivocally expressed.'"). Thus, to apply FSIA to limit the scope of tribal immunity would contradict this Court's precedent in addition to undermining congressional intent.[9]

In summary, this case does not present any novel question of federal law, but merely demonstrates the application of the well-established doctrine of sovereign immunity to bar a suit against a federally recognized Indian tribe in state court. Accordingly, there is no compelling reason for this Court's discretionary review of the unpublished Arizona Court of Appeals decision. *See* Sup. Ct. Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). The Petition for Certiorari should be denied.

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[9] The Petition (at 26) opines that this Court should not "infer" congressional intent that tribal immunity be retained by virtue of its failure to enact legislation limiting tribal immunity in the same way foreign sovereigns are limited. The Court need not make a negative inference of congressional intent based on Congress' failure to act to restrict tribal immunity. As noted in *Kiowa*, Congress *has* restricted tribal immunity under limited circumstances. *See Kiowa*, 523 U.S. at 758-59. Affirmative congressional acts, which limit tribal immunity – though not to the extent set forth in FSIA – evidence Congress' affirmative intent to permit tribal sovereigns to retain immunity beyond that left to foreign sovereigns.

II. Petitioner's Claim that the Release *He* Signed Constitutes an Implied Waiver by *the Tribe* of Its Immunity Is Absurd.

"It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. at 55-56 (1978) (citations omitted).[10] Indeed, "[t]here is a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001). Any purported waiver of immunity "must be 'construed strictly in favor of the sovereign,' and not 'enlarge[d] . . . beyond what the language requires.'" *United States v. Nordic Village Inc.*, 503 U.S. 30, 34 (1992) (citations omitted).

Notwithstanding the requirement that any waiver must be both express and made by the tribe, Petitioner nevertheless argues that *his* waiver of liability *against the Tribe* should somehow be construed as waiving *the Tribe's* immunity from suit by him. That

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[10] Precedent consistently precludes any implied waiver of sovereign immunity. Waiver requires the intentional relinquishment of a right. *Schneckloth v. Bustamonte*, 412 U.S. 218, 238 (1973). "[T]o relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). *Accord Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe"). A similar requirement applies with respect to the sovereign immunity of the United States. "Such waiver cannot be implied, but must be unequivocally expressed." *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985).

argument misconstrues this Court's decision in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001).

In *C & L Enterprises*, an *express* waiver was found to exist because the tribe explicitly agreed to be bound by an arbitration clause that anticipated enforcement in Oklahoma state courts. In contrast, the Tribe here did not expressly and unequivocally agree to waive its immunity from suit in any contract with Petitioner. To the contrary, in the Release, the sole source of the waiver urged by Petitioner, *he* agreed to waive any claim *he* might have *against the Tribe* and to release the Tribe of any liability. There is nothing in this instrument indicating that the Tribe expressly and unequivocally agreed to waive its inherent sovereign immunity, let alone consented to be sued in state court. Obtaining a signed acknowledgment of the waiver and release of any claim that might theoretically be made against the tribe cannot be considered an express waiver of sovereign immunity. *See, e.g.*, *In re SRC Holding Corp.*, 545 F.3d 661, 670 (8th Cir. 2008) ("Nothing prevents the parties from using a 'belt and suspenders' approach in drafting the exclusions, in order to be 'doubly sure.'").

Petitioner's comparison of the Release form here to the execution of a state licensing application at issue in *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008), Pet. at 29-30, is equally far-fetched. Similar to the arbitration agreement at issue in *C & L Enterprises*, the tribe in *Bittle* arguably agreed to submit to the

liquor laws of the State of Oklahoma when that tribe executed its licensing application to obtain a state issued liquor license. Consistent with this Court's reasoning in *C & L Enterprises*, the *Bittle* court held the tribe's agreement to be bound by Oklahoma law to be an explicit waiver of its sovereign immunity.

By contrast, the Tribe here made no agreement with the Petitioner to be bound by Arizona law or subject to suit in Arizona courts. Specifically, the Release form states no waiver at all by the Tribe. It is unilaterally signed by the Petitioner and only *he* agreed to be bound by its assumption of risk and release provisions. There is no basis for finding an explicit and unequivocal waiver of immunity by the Tribe. Accordingly, there is no compelling reason to grant certiorari as to the unpublished decision of the state court on this alternative issue, either. *See* Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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